Comprehensive Contract Theory: a Four-Norm Model of Contract Relations

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This article proposes a new version of relational contract theory. This version, here christened 'comprehensive contract theory', builds on Ian Macneil's approach of seeing contracts as complex relations (rather than discrete transactions), which fall along a spectrum from highly transactional ('as-if-discrete') to the highly relational and diffuse, and of providing a set of norms for use as tools of analysis of contracts (as documents), individual relationships (existing or planned), contract as a phenomenon, and law reform proposals. It departs from Macneil in that it rejects some of his norms altogether, and offers a simpler and more universally applicable analysis based on only four universal contract norms. These are submitted to be more readily employed by practitioners and law reformers, and more readily taught even to undergraduate law students, thereby holding out the prospect of greater penetration for relational theory and for its practical utilisation by reformers, judges and lawyers in practice.

Introduction

Relational contract theory, first promulgated by Ian R Macneil and Stewart Macaulay from the 1960s onwards, argues that rather than being the discrete, clear-cut, sharp-in-sharp-out 'deals' that lawyers and jurists had been habituated to thinking of them as being, contracts in reality are fuzzy, complex, interconnected webs of relations, in which contract as a legal institution, to borrow and misuse Macaulay's phrase, 'floats on a sea of custom'.[1] The theory has proved highly influential, gaining wide acceptance for its fundamental insight that the more accurate paradigm of contract-in-fact (as opposed to contract-in-the-courts, or contract-in-law-books) is the relationship rather than the discrete transaction, even amongst those who do not accept the further conclusions of the theory's principal proponents.[2]

Macneil's relational contract theory is positive in that its norms are descriptive of contracting behaviours and concerns, not normative in the more usual sense, though the use of the word has led many, who have not read the work properly, to assume that the theory is normative and thus to ignore it.

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1 S Macaulay, 'Relational Contract Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94 *Northwestern Univ L Rev* 775.

2 For some legal academics, the subject of 'contracts' begins and ends with doctrine — what is the rule on this and that, what authority supports that rule, what are the exceptions, what authorities support the exceptions? In other words, contracts is what you find in books called 'The Law of Contract' or something of that sort. For them, what Macneil has to say is incomprehensible, and what this article has to say will be meaningless. Neither is concerned with contract law (or even law) in such a restricted and traditional sense.

Macneil's literature is extensive, sometimes impenetrable without considerable patience and flexibility of mind, and his scheme in itself is complex and hard to keep in mind all at once. As Jay Feinman has pointed out, 'while Macneil's work is widely cited, the level of engagement with its details has not been commensurate with its contribution, and the work is frequently misread by scholars'.[3] Feinman also stressed the widespread misinterpretation of Macneil's theory in an essay the following year: 'Macneil's richer analysis . . . has been widely misunderstood and, as misunderstood, has not been embraced by mainstream scholars'.[4]

In his essay for the same volume, Peter Vincent-Jones considers the variety of approaches taken by scholars in the UK, all of which, he believes, tend to distort Macneil's message, particularly, it seems, due to a distinct tendency to adopt the notion of the discrete–relational spectrum (or the misleading idea of the distinction between discrete and relational contracts), without giving sufficient (or any) notice to Macneil's contract norms.[5]

A further barrier to wider acceptance and exploitation of Macneil's theory is the perception that it is communitarian, and utopian in its ideology. It is a charge which, whilst being frank about his own communitarian preferences, Macneil testily denies as a feature of his theory, the ideological neutrality of which he firmly asserts,[6] arguing that essential contract theory provides merely a set of lenses through which to analyse exchange relations which is as ideologically neutral as it can be made to be.[7] And, indeed, the present author has illustrated a distinctly non-communitarian, economically liberal (almost laissez-faire) application of Macneil's approach.[8]

Relational Contract Theory and Contract Law Doctrine

It is outside the scope of this article to discuss the relationship between either Macneil's norms, or the present author's own four norms, and substantive contract doctrine. The present author has demonstrated elsewhere[9] that doctrinal contract law does to a considerable extent support these norms.[10]

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3 J M Feinman, 'Relational Theory in Context' (2000) 94 *Northwestern Univ L Rev* 737.

4 J M Feinman, 'The Reception of Ian Macneil's Work on Contract in the USA' in *The Relational Theory of Contract: Selected Works of Ian Macneil*, ed D Campbell, Sweet & Maxwell, London, 2001, p 59.

5 P Vincent-Jones, 'The Reception of Ian Macneil's Work on Contract in the UK' in *The Relational Theory of Contract: Selected Works of Ian Macneil* ed D Campbell, Sweet & Maxwell, London, 2001, p 67, and see especially pp 69–74. This latter division — between discrete and relational contracts — is a feature of many analyses, and particularly of analyses in the management studies literature, but is, it is submitted, quite mistaken. Macneil's claim has always been that there are no such things as genuinely discrete contracts, as all contracts contain some relational elements: 'The Many Futures of Contract' (1974) 47 *Southern California Law Rev* 691 at 773, n 235.

6 See, especially, I R Macneil, 'Contracting Worlds and Essential Contract Theory' (2000) 9 *Social and Legal Studies* 431 at 433.

7 In eds D Campbell, H Collins and J Wightman, *Implicit Dimensions of Contract — Discrete, Relational and Network Contracts*, Hart, Oxford, 2003.

8 R Austen-Baker, 'Consumer-Supplier Relations, Regulation and Essential Contract Theory' (2008) 24 *JCL* 60.

9 With reference to English law.

10 R Austen-Baker, 'A Relational Law of Contract?' (2004) 20 *JCL* 125. I have undergone a considerable change of heart as to the utility of a relational theory of contract since writing

The relationalist argues that this is necessarily the case, since contract law systems that did not correspond at least to some extent with the tacit expectations of parties contained within these norms would fall into disrepute and disuse. The extent to which the doctrines of each and every contract law system around the world fit with the expectations of relational norms[11] would, however, require a major undertaking in the comparative law field.

Uses of Relational Contract Norms

The uses of these norms are various, but the main uses, in this author's submission, are five in number:

(1) they permit the social scientist better to understand and describe economic exchange activity;
(2) they enable businesspeople, in designing their relationships with other businesses, better to understand the likely consequences (for the success or failure of their planned relationships) of adopting different alternative approaches to planning those relationships;
(3) they allow the drafter of contracts to draft more effectively and efficiently, by enabling the better identification of likely stress points in the relationship in question, and the probable most effective approaches to providing for these;
(4) they can assist the judge in discerning what Macaulay called 'the real deal'[12] in commercial disputes and thus to come closer to meeting the real commercial expectations of the parties; and
(5) they can help the law reformer (for example, a Law Commissioner, or similar, or a legislator or advisor to legislators or ministers) to ensure that any proposed reform to the legal environment of contract will work with rather than against the needs of real contract relations.

The emphasis placed on one or some rather than others of the above will depend on the ends of the user in question. Certainly, in some of Macneil's relational contract writing he advances the view that there is a need for a new type of law of contract; that is to say, that the project with which Macneil was concerned was creating an alternative jurisprudence of contract to replace what was then widely regarded as a discredited 'neo-classical' contract scheme.[13] But this has to be set against the arguments that traditional contract law has served us well and can and will continue to do so.[14] It is by no means necessarily the case that the relationalist seeks a new law of contract on

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that article, and would now wish to distance myself from my remarks in that respect, which were made on the basis of an outdated reading of relationalists' purpose that is, that they were still interested in developing a new, relational *law* of contract. However, my analysis of the linkage between substantive contract doctrine and relational norms, the main thrust of that article, stands.

11 Which always have to be interpreted differently in different business/contracting cultures.

12 S Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 *MLR* 44.

13 See, in particular, I R Macneil, 'Reflections on Relational Contract' (1985) 141 *Journal of Institutional and Theoretical Economics* 541 at 542.

14 I R Macneil, 'Barriers to the Idea of Relational Contracts' in ed F Nicklish, *The Complex Long-Term Contract*, C F Müller Juristischer Verlag, Heidelberg, 1987, p 36. See also Austen-Baker, above, n 10.

relational lines. This author does not argue for that and, indeed, has argued elsewhere that much of existing contract jurisprudence copes well with the reality of the contract relation, as seen through the lens of relational contract theory.[15]

The Desirability of a New Version of Relational Theory

A number of barriers to the acceptance, dissemination and wide use (particularly in the realm of legal practice) have been adumbrated above. It seems that most of the barriers are really bound up in one of them: the very richness of the analytical scheme which Macneil's theory (renamed by him 'essential contract theory'[16]) offers. There are a number of possible approaches, invited by the complexity of Macneil's own writings. In particular, the system of norms, which has, in this author's submission, the greatest potential for useful application in the ways outlined above, is itself rather complicated. Macneil sets out 10 common contract norms,[17] namely:

(1) role integrity;
(2) reciprocity (or 'mutuality');
(3) implementation of planning;
(4) effectuation of consent;
(5) flexibility;
(6) contractual solidarity;
(7) the 'linking norms' (restitution, reliance and expectation interests);
(8) the power norm (creation and restraint of power);
(9) propriety of means; and
(10) harmonisation with the social matrix.

Whilst the present author agrees that this collection of norms, for the reasons Macneil has argued over the decades, provide a rich and revealing tool of analysis, it is submitted that for most of the purposes identified in this article these are over-numerous and overly-focussed. This article will argue that a model of contract relations based on four norms would suffice, and it is submitted that such a model would be, by its nature, more attractive and readily manipulated than Macneil's system. A second advantage would be that it is arguably closer to Macneil's own original intentions, as regards the norms, in that he began with a much simpler system of only five norms, namely reciprocity, role effectuation, limited freedom of exercise of choice, effectuation of planning, and harmonising with the social matrix.[18] Finally, it may be said that some of Macneil's norms are arguable at the least.

A single instance will suffice to illustrate this latter issue: the seventh in the above list, 'the linking norms', that is, the restitution, reliance and expectation interests. It is submitted that these are not norms in the sense that Macneil claims, or in any other sense. The effectuation of such interests through

15 Above, n 10.

16 I R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94 *Northwestern U Law Rev* 877.

17 The number has varied over time, but seem to have settled on the ten listed here, which are those stated in I R Macneil, 'Contracting Worlds and Essential Contract Theory', above, n 6, and repeated in I R Macneil, 'Reflections on Relational Contract Theory after a Neo-classical Seminar', n 13, above.

18 'The Many Futures of Contract', above, n 5, p 809.

remedies might, arguably, be regarded as norms of judicial behaviour in relation to contracts, but this is unconvincing. Recent articles by Daniel Friedmann[19] and Charlie Webb[20] have put powerful cases against the Fullerian three interest approach.[21] These arguments are themselves flawed in that they are premised on the idea that Fuller put these forward as 'contract interests' which Friedmann and Webb both argue (correctly in the view of this author) they are not; in fact, Fuller suggested that these were not interests in contracts, but interests in contract damages, which is not quite the same thing. Nonetheless, the value of these arguments is in pointing to the conclusion that the interest at the centre of contract (we might say a fundamental norm) is performance, rather than expectation. This is not why we enter contracts in the strict legal-doctrinal sense of the term, as Friedmann and Webb both suggest, since we can get performance (but not damages) from bare promise or agreement; we enter contracts to secure an insurance against the other party's failure to perform. But the broader, Macneil sense of contract encompasses all agreements achieving economic exchange, whether or not these would be valid contracts in a court in England and Wales or Massachusetts or anywhere else. Once this broader notion of contract is accepted, at least for the purposes of discussion, it becomes clear that performance, not the protection of restitution, reliance or expectation interests in damages, is the relevant norm in contract.

Macneil has also identified at least four other norms that arise closer to the poles of the relational-transactional axis:[22]

(11) enhancing discreteness and presentiation;
(12) preservation of the relation;
(13) harmonisation of relational conflict; and
(14) supracontract norms.

This author argues that there are excessive overlaps amongst Macneil's norms. These four norms are identified as 'intensifications' of other norms. A norm might intensify as the relation moves towards one or other end of the axis. Macneil's norm of preservation of the relation is, he says, an intensification of the norm of contractual solidarity.[23] The 'discrete norm' of enhancing discreteness and presentiation is a 'great magnification' of the norms of implementation of planning and effectuation of consent,[24] becoming relevant as one gets closer to the almost-transaction. It is thus also an intensification, in the manner of preservation of the relation. An inherent difficulty here, in this author's submission, is that of identifying the circumstances of application: that is, when is a relation sufficiently relational or transactional to justify moving from standard norms to intensified norms in analysis? This will most likely be obvious at the extremes, but will be doubtful at any point in between. A second difficulty is that replication is complication,

19 D. Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628.
20 C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *OJLS* 41.
21 Originally propounded in L L Fuller and W R Perdue Jr, 'The Reliance Interest in Contract Damages' (1933) 46 *Yale LJ* 52 and 373.
22 I R Macneil, *The New Social Contract*, Yale UP, New Haven, Conn, 1980, pp 59–70.
23 Above, n 22, p 66.
24 Above, n 22, p 59.

of which the theory has quite enough without more. And this replication and complication happens yet again with the norm of harmonisation of relational conflict, which Macneil accepts could be readily subsumed into preservation of the relation.[25] Moreover, this also suffers from the intensification problem of identification of circumstances when it becomes desirable to consider this norm separately.

It is submitted, then, that much is to be gained from an attempt at producing a version of relational contract theory, based on the idea of 'norms in a positivist sense' in addition to the notion of a spectrum, but that is simpler than Macneil's. It is also submitted that, despite being less precise in some respects, it would be, at normal operating levels, more accurate because the norms can be more universally applicable if intensifications and specialised aspects can be dispensed with. As well as being offered as a better and more accessible way of realising the five functions of relational contract theory identified above, the four-norm model put forward in this article is also likely to be more readily grasped by learners, so that this simpler model, maintaining Macneil's approach of the spectrum coupled with positive norms, has the potential for greater impact because it is more readily disseminated to, and grasped by, a wider range of people. An approach that could readily be taught to undergraduates could thereby also affect practitioners' outlooks, a problem which Campbell identified as a barrier to the adoption of new approaches to contract.[26]

> It was possible to say [of socio-legal approaches to contract law by 1995] at least an 'embryonic' rival to the classical law was in the process of emerging. There were two obvious lacunae which might have been used as evidence to dispute this rather optimistic analysis. The first was a lack of a comprehensive and coherent theoretical statement of the rival. The second was *a lack of penetration of rival contract scholarship into the practitioner's understanding of the subject.*

It may be that, despite the present author's, rather immodest, choice of the term 'comprehensive contract theory' to describe the particular version of relational contract theory described in this article,[27] it will not be possible to fill the first of the lacunae Campbell identifies. It seems reasonable to think that the inherent plurality of socio-legal approaches to contract (or any other field of law) necessarily rules out the possibility of a single, uncontested and universal 'socio-legal theory of contract'. What is proposed here, however, is that this article's broader-brush, yet thereby streamlined, approach will be more readily inculcated into the next generation of practitioners (who are not, by and large, the next, or any, generation of postgraduate academic law students), and thus offers some prospect of filling Campell's second lacuna.

The Four Universal Contract Norms

In place of Macneil's norms, the author will propose in this article four broad norms, which he will call 'universal contract norms', namely:

(1) preservation of the relation;

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25 Above, n 22, p 67.

26 D Campbell, 'Reflexivity and Welfarism in the Modern Law of Contract' (2000) 20 *OJLS* 477 at 479 (emphasis added).

27 See text following n 104, below.

(2) harmonisation with the social matrix;
(3) satisfying performance expectations; and
(4) substantial fairness.

Two of these, namely 'harmonisation with the social matrix' and 'preservation of the relation' share their names with norms of Macneil's. They are not, however, identical with Macneil's versions, but are used here because they share a good deal in common with Macneil's norms of the same name, comprehend those norms, amongst others, and are apt terms to describe the norms here proposed. These four norms will now be discussed in turn.

Preservation of the Relation

Relational contract theories assume that in the bulk of instances, contracting parties are likely to want to perpetuate exchange relations. For most of us, the main contractual relation we have is our employment — we aim, presumably, to earn not less than what we expend, so our employment accounts for at least 50 per cent by value of our economic activity. Generally, too, this will be a relationship that we will see as being long-term and that we will tend to wish to perpetuate, at least until a better offer comes along.

Other relations we are in we may not see as being long-term or even 'relations'. Whilst we appreciate that we have relations with our telephone company, cable television company, broadband provider, bank and so on, which tend to be fairly long-term, we probably tend not to think about our relationship with, say, a major supermarket, in quite the same light. There is, however, cause to take a different view. If a family spends an average of, say, £150 a week in their local branch, then the annual spend comes to £7800, equivalent to the purchase price of a brand-new family hatchback every year. A motor car dealer would consider a customer who bought a brand-new car every year to be rather a good customer and would seek to keep the relationship going. The grocery customer spending £7800 per annum is probably a reasonably typical, certainly not exceptional customer for a supermarket chain, but not contemptible for that, and the supermarket is likely to wish to retain the customer's business.

There are a good many reasons why contracting parties might want to keep a relationship in being over an extended period. A few examples will suffice to illustrate the breadth of the range of reasons parties have for keeping relationships going.[28]

(a) It typically costs more (in terms of average advertising or marketing spend per new customer) to win new customers than to keep existing customers.

(b) Transaction costs may be higher outside relations: (i) If replacement business has to be won repeatedly, costs such as carrying out credit checks, setting up accounts, providing initial hardware and installation assistance are also repeated. For example, a cable television company may need to lay cable to the house and will certainly need to supply a set-top box; an internet service provider will need to provide a modem (some are now going further and

28 See, generally, J L Heskett et al, 'Putting the Service-Profit Chain to Work' (1994) 72 *Harv Bus Rev* 441.

offering free laptop computers as a draw to persuade customers to sign up for broadband internet provision), and will have to pay connection fees with telecom providers; a mobile telephone company will expect to have to provide a handset and a SIM card. There will usually be staff time involved in this as well as the supply of hardware. (ii) It is likely that a certain proportion of relations (or transactions) will end in conflict. The conflict may precipitate the end of the exchange relation in question, which might be avoided if more effort is made to keep the relation together; alternatively, the end of the relationship may be what precipitates the conflict, whether because one of the parties resents the ending of the relation and seeks to make it difficult, or because one of the parties feels that it has not yet gained the full return on its investment or a suitable reciprocation from the exchange and therefore needs the relation to be kept going for longer in order to benefit optimally from it, and thus seeks to recover an element of this through a lawsuit. Such actions will result in greater costs: lawyers on each side, staff time, diversion of higher management attention, and so on. Multiplying the number of contracts entered into is likely to multiply the absolute number of such conflicts, thereby multiplying the associated costs.

(c) A customer might prefer to keep with a particular supplier because it is inconvenient to move suppliers (even when it is not very difficult, if people are disinclined or are, to use the current jargon, 'time poor', they may consider it too much trouble all the same), or because they like the service and fear worse service elsewhere.[29]

(d) Some contractual relations function better for both sides and become more meaningful as time passes.[30] Consider, for example, the relation between a customer and his or her bank. As time passes, the relationship manager gets to know the customer's habits, earning and spending patterns, risk preferences and so forth, and is thus in a better position to give reliable advice on borrowing, investment and banking services generally, including drawing the customer's attention to new 'products' (or not, if they are unlikely to be suitable for that customer). Other instances might be, for example, a tailor or a wine merchant, who gets to know the customer's requirements and preferences, and price range. So, a long-term relation might serve to make individual transactions under its umbrella more satisfactory for both parties *qua* the transaction itself; that is to say, each transaction will be better than it would otherwise likely have been, because of improved information and understanding between the parties, derived from the prior existence of the relation.

(e) Some exchanges depend on trust or work much better in an environment of trust,[31] so that less risk is involved in continuing the relationship (this is true of a good many employment relations, especially, for instance, employing a branch manager of some description, where the

29 See eg M A Jones, D L Mothersbaugh and S E Beatty, 'Why Customers Stay: Measuring the Underlying Dimensions of Services Switching Costs and Managing Their Differential Strategic Outcome' (2002) 55 *J Bus Research* 164.

30 See eg R C Fink, L F Edelman and K J Hatten, 'Supplier Performance Improvements in Relational Exchanges' (2002) 22 *J Bus & Industrial Marketing* 29.

31 On the role of trust in business in enabling contracting and promoting more effective contract relations, see generally B Burchell and F Wilkinson, 'Trust, Business Relationships

employee will have considerable fiduciary responsibilities).

(f) Non-economic satisfactions are likely to increase with the longevity of the relation. Probably all of us are conscious of sometimes making contractual choices based partly at least on non-economic satisfactions; for instance, using a particular shop because we have got to know the proprietor or manager and enjoy a little chat when we go in, even though we might get the same goods cheaper elsewhere.

(g) Greater stability is derived from long-term relations than from short-term ones, and planning is easier. It is not intended here to contrast 'relational', long-term relations with 'transactional' short-term discrete-type (or perhaps 'discrete-style') exchanges, such as spot market commodity purchases, but rather to contrast relations of any kind that in fact endure with otherwise similar relations that do not endure. That is to say, the latter must be ones that had the potential for longer existence, so that one can meaningfully ask whether it might not be better to make them long rather than short-lived.[32] This may best be illustrated with a hypothetical example: a car dealer might generally be able to predict that it will sell, say, 100 new cars of a particular model each year and negotiate with the manufacturer, and rent showroom space, and employ staff and so on, on the basis of that being a reasonably reliable prediction. Indeed, much exchange projection is non-contractual, exactly like this.[33] However, it is surely even better if the dealer can rely on continuing relations with specific customers to account for a significant element of the expected sales, rather than just relying on historic sales figures holding up with the public at large. Better still, if there are actual agreements in place — repeat, long notice, advance orders for the vehicles. A dealer in one of these latter two positions is in a happier case in terms of both future planning and of the stability of his or her business model.

No doubt a good many other reasons could be proposed, but these will serve just to highlight the diversity of factors favouring holding relations together. It should be clear that holding relations together is commonly a norm of exchange behaviour. It is suggested that it is so, to some extent, all of the time: contracts are entered into in the expectation of performance, not of breach. Therefore, it is automatically at least a weak norm of virtually all contractual relations, whilst being a very strong norm in others. Indeed, a business with a reputation for breaking contracts or for being notable for its involvement in enterprises which fail, is likely to find it at least a little more difficult to do business with those that are aware of this reputation, which indicates that other parties are not generally satisfied with the prospect of a payout from a breached contract: they want, and expect, performance.[34]

The strength of this norm, in any given relation, will depend upon where the

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and the Contractual Environment' (1997) 21 *Cambridge J Economics* 217; also K J Blois, 'Trust in Business to Business Relationships: An Evaluation of its Status' (1999) 36 *J Management Studies* 197.

32 The comparison is otherwise between apples and oranges, so to speak: comparing fundamentally short-term, rather transactional, contracts with ones that are at least potentially enduring.

33 For a discussion of this by Macneil, see 'The Many Futures of Contract', above, n 5, 717–20.

34 Again, see generally the 'trust' literature, above, n 31.

relation in question falls along the transaction-relation spectrum. A number of factors will determine the strength of the norm:

Norm of Preservation of Relation

Weak	**Strong**
Relation is expected to be short-term	Relation is anticipated to be long-term or indefinite
Relation involves exchange of easily monetised goods	Subject matter of exchange less readily monetised in full
Contract clearly allocates defined benefits and burdens	Contract relies on sharing of benefits and burdens over time
Relatively simple measurement of performance	Determining whether performance is complete is difficult – and may even be impossible

So the norm is stronger in cases where the relation is *expected* to last, rather than to be of short duration. It is stronger where the subject matter is less easily or reliably monetised. The norm is strong where the business sense of the contract depends on the sharing of benefits and burdens over time; weak where there is a clear allocation of defined benefits and burdens at the time the contract is made. Similarly, where measurement of *performance* is easy, so that it can readily be said 'this contract has been performed', exit from the relation will seem less fraught than where it is harder to determine the completeness of performance.[35]

Macneil sees preservation of the relation and harmonisation of relational conflict as norms in their own right, but also as intensifications of the norm of contractual solidarity. They are all closely kindred, in that contractual solidarity *is* the desire to preserve the relation, and this cannot be realised without harmonising relational conflict. I propose, therefore, that the single norm of preservation of the relation, in the terms delineated above, will suffice for most analyses in place of Macneil's three.

Harmonisation with the Social Matrix

Macneil says of his norm of harmonisation with the social matrix that it is:[36]

> . . . both the most difficult and the easiest to treat. Most difficult because it introduces into contracts every norm known to man, easiest because the very magnitude of the task precludes one from trying it.

It is probably impossible to *do* very much with a norm that encompasses 'every norm known to man'; certainly it would be somewhat difficult to discuss it fully in relation to every (or any) contract or rule of contract law one

35 When, for instance, is a normal, open-ended employment contract 'completely performed' to the point of terminating through performance?

36 *The New Social Contract*, above, n 22, 58.

considers, however rich a classificatory apparatus is desired. More than that: literally applied it would make it nugatory to apply any of the other norms of contract (whether the four proposed in this article or Macneil's 10 or 14), since these are 'norms known to man' and therefore included within this one. If such a norm is to help us in studying contracts, it might be better to think of it as involving two different notions: first that the provisions of the contract rule book need to be acceptable to the mores of the society in which they are to apply (which is likely to dictate the adoption of different rules in different jurisdictions, of course); and, second, that individual contractual relations are ill-fitted to survive if they offend against significant local social expectations, with the definition of 'local' being elastic, and dependent upon the particular circumstances.[37]

The Need for the Rule Book to Conform to Social Mores

To what extent do laws reflect, or conflict with, social mores, as opposed to forming them? An obvious example from outside the realm of contracts where the question could be applied is that of 'underage' sexual activity. Was it a fixed moral principle of Britain in the 1880s that it was wrong for a man to have sexual intercourse with a 15-year-old girl, but acceptable once she turned 16? The answer, one suspects, would be that it was probably not: what significant sections of the UK population regard as a clear moral borderline has been created by legislative action, namely the Criminal Law Amendment Act 1885; a morality that is the creature of the law. If 21 had been chosen or 13 retained (or even 12, up until 1875), general views of sexual morality in England today might be rather different.

By contrast, let us take the example of slightly exceeding the motorway speed limit as one where people will appreciate that the law needs to set often entirely arbitrary rules in order to prevent excessive and immoral behaviour. Driving in a manner that is thoroughly dangerous and puts other people's lives at risk, perhaps because one is not adequately in control of one's car above a certain speed (a variable according to the skills and condition of the driver, the driving conditions, and the capabilities of the vehicle), is, no doubt most people would agree, immoral or unethical behaviour. However, whilst 80 miles per hour on the motorway might be too high for some conditions, cars, and drivers, 100 miles per hour would be perfectly safe for many others (Germany, for instance, retains a considerable length of unrestricted autobahn). The law, however, draws a very strict and arbitrary line, ignoring these variable factors. The majority of people appreciate these facts and nod at mild infringements, especially where no accident occurs. However, this is far from a universal attitude: there are quite a few people for whom breaking the speed limit is on a par with, say, a mugging or a burglary; that is to say, a crime is a crime and that is all we need to know. For them, the whole

37 The importance of locality must not be downplayed in these considerations. Expectations of both businesspeople and the community at large will be different from place to place. This represents a considerable challenge to those seeking to generate uniform laws, especially where jurisdictions have quite different traditions.

question of morality boils down to whether or not something is prohibited by law.[38]

This is, of course, a long-standing debate, and it is not going to be settled here whether law forms morality or vice versa and whether legislators should advocate the desires of the governed or, having secured their votes, 'give a lead' by imposing their own ideas on the electorate. It is sufficient to remind ourselves of the power of the law to mould social mores along purely arbitrary lines, so that one can see the potential for public attitudes and expectations to adapt to new law.

Discussing the extent to which our laws reflect and conform with established social mores is a daily preoccupation of many a politician, jurist and journalist. The law is quite often accused of being 'out of touch', or of not being 'fit for purpose'.[39] Such complaints, when widespread and persistent, often form the basis for policymakers' consideration of needful reform. Every student of contracts can ask him- or herself 'is the rule (or proposed rule) one which could be criticised for being "out of touch", or is it "fit for purpose"?' In doing so, he or she interrogates the rule as to its harmonisation with the social matrix. The uncertainty of the answer is something we have to live with, but the greater the extent to which the questioner is 'in touch', the better.

Still less clear is what the consequences might be of the contract rule book being out of line with broader social norms. Interestingly, whilst there have been over the years many debates about laws seen by some (but usually not everyone) to be out of alignment with society at the time; for instance debates over homosexuality, abortion, vivisection, cloning, research using embryos, gambling;[40] contract law does not seem to have figured. This deprives us of the opportunity of being able to point to any clear empirical evidence of the likely consequences of a misalignment of contract rule book values and societal norms. Where other laws are seen as problematic, what seems generally to have been the case is that campaigners have generated attention and sometimes got a change in the law, sometimes gone away. Major mismatches between laws and social mores usually see laws fall into unofficial desuetude (not an option for the bulk of the contract rule book). Perhaps it is

38 Paradoxically, these people, though perhaps regarded as tiresome by the majority, are not a problem so far as harmonisation of legal rules with the social matrix is concerned, since whatever law is in force — especially if it is prohibitory in nature — will by definition be a perfect fit for *their* mores, so that the law never has any problem harmonising with them.

39 A term itself derived from the English Sale of Goods Act 1893, now 1979.

40 It has been objected to the author that gambling is an example of a form of exchange relation that survived very well whilst 'failing to harmonise with the social matrix' (because much gambling was illegal for many years, tightly controlled subsequently, and wagering contracts were unenforceable). Of course, this is quite the opposite of the reality, and provides a good instance. In English law, gambling was, to a large degree, illegal for very many years, is still regulated, and up to 1 September 2007, debts alleged to arise from a contract of wager were not enforceable. The fact that gambling survived so well is due to the fact that it *did* in fact harmonise with the social matrix: most people were perfectly happy about it (so long as it was not *their* husband/wife/son/daughter who was a *problem* gambler). It was the law that was not properly harmonised with the social matrix, and it is the law that has changed, as gambling has become much less stringently controlled than in the past, and by s 334 Gambling Act 2005, gaming debts have become enforceable in English law, thus bringing the *law itself* into harmonisation with the social matrix, which is determined by commonly accepted standards of behaviour and morality rather than by paternalistic fiat.

the case that since contract law is an important issue for commerce, changes have always been achieved, whether through occasional legislative intervention or, more often, gradual judicial innovation, with little controversy.

In sum, it is submitted that while this aspect of the norm does present some difficulties in terms of the availability of empirical examples and therefore being able to identify with any degree of precision how it operates, it is probably rarely an active issue, since the law *has in fact* kept company with expectations to a very large extent, at least. Nonetheless, its application provides infinite opportunity for discussion for the student of contracts.

Conformity of Individual Contract Relations with Broader Social Norms

This offers perhaps rather less scope for purely academic discussion, but is far more likely to be a pressing practical problem. Nonetheless, it offers opportunities to consider possible reasons why relations that have ended up in the pages of the law reports ended so unfortunately.

Baldly stated, one version of the norm of harmonisation with the social matrix is that contractual relations are far more likely to survive and prosper if they are, in as many aspects as possible, in conformity with broader social norms. The more the parties have organised their relations in such a way that people outside the relation would consider improper, unethical, immoral, the less likely the relation is to survive over a long period or to yield up all the benefits the parties would want to derive from it. Some contractual relations are, due to their subject matter, automatically regarded as so much at odds with social norms that they are not permitted. The prohibition of some kinds of contractual relation is explicable in terms of this norm. Others offend against social mores through their processes, and these are doubtfully enforceable. Yet others simply fail to achieve their objectives and, though theoretically enforceable, come to what may be called 'a sticky end'.

As indicated above, three categories of instance come under this heading. The first, those in which the relation, owing to its subject matter or some part of it, has come to be automatically prohibited as a matter of law, so that the norm helps us discuss and understand the structure of prohibition in contract law, prompts us to consider the continuing relevance of the prohibition, and should inform debates concerning the prohibition. The second is where doubt is cast over the validity of the contract and it may not always be enforced, due to some procedural element that offends, or might be taken to offend, against broader norms. The third is where individual contract relations that are not prohibited have nonetheless failed, due, it might be posited in the individual case, to a failure to conform to applicable social mores. Any given case's membership of the latter category is, obviously, much more arguable than membership of the former categories. It may be helpful to consider these three categories in turn.

Legally prohibited relations

Treitel notes that contracts may be, depending on the contract and the circumstance, 'illegal, void or unenforceable'.[41] These can, arguably at least, all be categorised as 'prohibited' if we take the term to mean that the courts will not recognise them as valid contracts (taking as a definition that a contract, or at least a valid contract, is an agreement enforceable in the courts — the essence of the widely-cited definition in the Restatement (2d) of Contracts). Treitel identifies three main types of illegality in contracts:[42] 'contracts involving the commission of a legal wrong';[43] 'contracts contrary to public policy';[44] and 'contracts in restraint of trade'.[45]

In Treitel's taxonomy of a total of 21 types of contract void for illegality, eight protect what might be called 'the majesty of the law'; that is to say that they strike down what would otherwise be contracts that would undermine the law and its purposes or the courts in which it is dispensed;[46] six protect the sanctity of marriage, love (the reasoning in some cases, at least, being that business arrangements do not accord with proper feelings of marital affection[47]), and family duty;[48] another four protect the interests of the State more narrowly — the State in international relations, and in its patronage;[49] while the remaining three uphold sexual morality, the liberty of the individual and freedom of trade.[50] Put in these terms, and stripped of the sometimes rather arcane-seeming detail, this is probably — without wishing to undertake an extensive empirical survey of public attitudes — a list of things that most people would agree should be protected and that private contracts ought not to be allowed to undermine. To this extent, they represent a nexus of

41 Sir G H Treitel, *The Law of Contract*, 11th ed, Sweet & Maxwell, London, 2003, p 513. He is referring here to statutory prohibitions, but I think the categorisation would apply to contracts generally that the courts decline to enforce due to the nature of the subject matter or mode of performance.

42 Above, n 41, pp 430ff.

43 Above, n 41.

44 Above, n 41, pp 439ff.

45 Above, n 41, pp 453ff.

46 Namely, a contract the making of which amounts to a legal wrong (Treitel, above, n 41, p 430); contracts to commit a crime (above, n 41, p 432); a contract for the deliberate commission of a civil wrong (above, n 41); a contract for subject matter to be used for an illegal purpose (above, n 41, p 443); contracts to be performed in an illegal manner (above, n 41); indemnities against liability for unlawful acts (above, n 41, p 435); contracts interfering with the course of justice (above, n 41, p 445); and contracts purporting to oust the jurisdiction of the courts (above, n 41, p 446).

47 See eg *Millward v Littlewood* (1850) 5 Ex 775.

48 Namely, agreements by married people to marry (Treitel, above, n 41, p 439); agreements between spouses for future separation (above, n 41, p 441); agreements in contemplation of divorce (above, n 41); agreements inconsistent with parental responsibility (above, n 41); agreements in restraint of marriage (above, n 41, p 442); and marriage brokerage contracts (above, n 41, p 442).

49 That is, contracts to deceive public authorities (Treitel, above, n 41, p 450); contracts for the sale of offices and honours (above, n 41, p 451); trading with the enemy in time of war (above, n 41, p 452); and contracts involving an illegal act in a friendly foreign country (above, n 41, p 452).

50 Namely, contracts promoting sexual immorality (Treitel, above, n 41, p 443); contracts restricting personal liberty (above, n 41, p 452); and contracts in restraint of trade (above, n 41, p 453).

harmonisation of laws of contract with the social matrix, and this probably is a case of the law being in harmony with broad social attitudes rather than forming them: the details by which the effects are sought to be achieved are surely too abstruse to have caught the popular imagination and thus converted themselves from arbitrary rules to widely-held social mores. Here the rule book conforms and also ensures individual contracts not conforming to these particular norms are weakened by depriving them of official support and even imposing sanctions on the making of them in some cases.

Procedurally compromised relations

In addition to contracts that are (effectively) prohibited by law, some contracts are deprived of the quality of enforceability for other reasons that have to do with them offending against social norms. The most egregious examples are where agreement has been obtained by deceit,[51] or by duress (whether physical[52] or economic[53]), or by undue influence.[54] Other examples are where agreement has resulted from a negligent[55] or innocent misrepresentation, or is the result of a mistake, particularly where the mistake is unilateral so that one party has 'snapped up a bargain' unfairly at the expense of the other.[56]

Enforceable contract relations that fail

By 'failure' the present author means that the relation does not survive and prosper long enough or well enough to bring the benefits the parties expected from the relation. One instance of failure would be when the relationship breaks down amid mutual recriminations followed by litigation over a breach of contract. But the contract need not end in breach to be a failure, it merely needs not to succeed in its objectives.[57]

An example of the latter case might be the Royal Air Force spending millions of pounds on training fighter pilots, who then leave for better money in, say, the Royal Saudi Air Force. The RAF clearly intends that its investment in training will bring the benefit of so much service from a fighter pilot once trained. The relationship has failed when a pilot leaves early to join another air force or become a civilian pilot, even though the pilot has left not in breach of the contract, but terminated it properly in accordance with its terms.[58]

It is at this point that contract theory begins to be interesting to those who

51 The *locus classicus* for which, in England, is *Derry v Peek* (1889) 14 App Cas 337.

52 See *Cumming v Ince* (1847) 11 QB 112; 116 ER 418; and see *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293.

53 For example, *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] QB 705.

54 See *Royal Bank of Scotland v Etridge (No 2)* [2002] AC 773; [2001] UKHL 44.

55 Actionable in England and Wales as a separate category since the Misrepresentation Act 1967.

56 As in *Hartog v Colin & Shields* [1939] 3 All ER 566.

57 Of course, the objectives may be unrealistic or unreasonable or undesirable, and fail not because of a fault *within* the relation, but rather because the relation was incapable of achieving such ends in any event — say, Accrington Stanley Football Club engaging a man in the pub as its manager, with the intention of winning the European Cup in two years. All sorts of conditions make this an impossible objective, but we do not need any theory of contract to help us understand why that is.

58 An adherent of 'efficient breach' theory would presumably regard the pilot's resignation as a great success, because it leads to his or her services being provided to someone who is

are not lawyers or jurists or law-makers, and to break into broader territory, because we ask the question: what makes economic relations more or less likely to succeed? How do we maximise the likelihood of the contract yielding all the benefits we hope and plan for, and minimise the possibility that it breaks down, whether contentiously or otherwise? Relational contract theory in general and Macneil's 'essential contract theory' in particular has tried to answer just this question. The answer, essentially, is that the more the parties ensure that their contract conforms to the norms suggested, the more likely the relation is to be successful. One aspect of this is that failure is more likely to result if the relation is not harmonised with broader norms external to the relation.

Examples of the causes of this kind of breakdown are those where the parties decide not to enter into the relation at all (not really a failure of a relation, so much as a failure to enter one; but it is related to what we are discussing here), and those cases in which contracts have to be abandoned because of external disapproval or pressure, aside from purely legal pressures. Imagine, for instance, a hospital's plans to sell off its staff and visitor car parking to a developer of 'executive homes'. The plan may not be illegal in any way and both the parties see advantages. But what happens next? The nurses are out in strike because they have nowhere to park. Doctors are complaining in the press that lives will be put at risk if they have to hunt round for parking places. The local community is up in arms, because they will have nowhere to park when visiting sick relations in the hospital. The hospital faces a severe public relations problem, and the developer comes in for massive odium throughout the region covered by the local newspapers and television and, quite likely, beyond, if the story makes it into the national media. The plan — seen as one to 'put profits before patients and their families' — is not harmonised with the social matrix, and the parties may well decide that it is not in their joint interests to continue after all, since they cannot clearly balance the unknown future effects of reputational damage and community resentment against the expected short-term economic benefits (which may also become harder to realise, if potential buyers are aware that the rest of the locality will regard them with hatred and, moreover, will clog them up with parked cars 24 hours a day).

Macneil commented in relation to this norm that:[59]

> It is important . . . merely to stress that . . . norms such as those relating to privacy, liberty, social obligation, ideology, and many others, will in any given society have immense impact on contractual relations. Thus an ever present necessity to harmonise the relations with them will exist.

And that:[60]

> It is only when society permits or encourages the discrete transaction that it can flourish, and then only within the ordained bounds . . . But [this] also has an affirmative aspect. Within the bounds, harmonisation with the social matrix occurs precisely by behaviour that maximises immediate self-interest. Society expects

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prepared to pay more for them; but the relation is not a success in its own terms, since its purpose was to provide a pilot for the RAF specifically, not a pilot generally.

59 *The New Social Contract*, above, n 22, p 58.

60 Above, n 22, p 59.

professional football teams to play hard and antagonistically within certain limits; it passes laws aimed at making market competitors compete and not collude.

Summary

The pressures for conformity with broader social norms are both legal and extra-legal in origin and both are powerful. Many contractual relations simply will not come into being if they are too far outside the bounds of social acceptability, others will come under pressure to break down with the mutual assent of the parties, others still might be litigated over because one party attempts to use the non-conformity of the relation in order to escape from it, perhaps with the benefits.[61]

In addition to the norm of harmonisation with the social matrix, Macneil proposed the norm of conformity with 'supracontract norms', which he considered to be an 'intensification' of the norm of harmonisation as one moves further towards the relational pole. It is submitted that this is a matter of degree, not a distinction of type, and that this article's proposed second norm of harmonisation with the social matrix can comprehend both of Macneil's norms quite comfortably.

Satisfying Performance Expectations

This probably seems somewhat obvious. It is, surely, an expectation that performance expectations be satisfied. But legal discourse has always entertained doubts about this. In the 19th century, Oliver W Holmes Jr, a Supreme Court Justice and for many years a law professor at Harvard, maintained that the only true obligation in contract was to pay damages for breach. That is to say, there is no obligation to perform stipulated acts (or to refrain, as the case may be) but a conditional obligation to pay damages, which can be avoided by performing as stipulated.[62] Sir Frederick Pollock dismissed this suggestion:[63]

> A man who bespeaks a coat of his tailor will scarcely be persuaded that he is only betting with the tailor that such a coat will not be made and delivered within a certain time. What he wants and means to have is the coat, not an insurance against not having a coat.

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61 A report by Amit Roy, *Sunday Times*, 2 April 1989 provides an entertaining illustration of this in the case of one Michael Gianakos (then 27 years old) who used his American Express card, he said, to purchase the services of prostitutes in three nightclubs in Baltimore, Maryland, but that the receipts showed the sums to be due for champagne and the like to disguise their illegal nature. He refused to pay on the grounds that the contract was void for illegality under the law of Maryland. I have not been able to find a report of the outcome of the case which was still pending at the time of the *Sunday Times* report, but whatever happened, it is an example of the relation breaking down in circumstances pointing to a lack of harmonisation with the social matrix (the nightclubs, 'The Pussycat', the 'Jewel in the Box' and the 'Golden Nugget', incidentally, were all in the red light district, though they denied involvement in prostitution), where one party seeks to use that very factor as a ground for opportunistic failure to perform his role in the relation (in this case, paying the bill).

62 See O W Holmes Jr, ed M deWolfe Howe, *The Common Law*, Macmillan, London, 1968, p 236.

63 Sir F W Pollock, *Principles of Contract*, 3rd ed, Stevens & Sons, London, 1881, p xix.

The argument persists: again, the efficient breach argument, discussed above, depends on the same idea, that a party to a contract is really just buying a chance of getting a certain amount of money, and whether this is achieved through performance or payment of damages does not matter. It is submitted that this is an unconvincing argument. Is it really desirable, for example, that a series of builders engaged in succession to do work on a person's house all renege and pay damages in order to go and do more profitable work? Will the householder be perfectly happy with the damages instead of a new roof or kitchen extension? Intuitively, our minds rebel against this sort of absurdity. Contracts scholars have, moreover, developed the notion of the 'performance interest', distinct from the expectation interest.[64] What they mean by 'performance' is not performance of the secondary obligation to pay damages, but performance of the primary stipulations.[65]

At the beginning of the 1960s Harold Havighurst proposed four 'uses' of contract, namely power, peace, enterprise and chance.[66] Of these the first three are, mainly, tied up with the idea of performance. Admittedly, the right to damages is power of a sort over another, but contracts are typically made in anticipation of wider power than this: the power to get something in particular *done*. The peace use of contract cannot be achieved without actual performance (or something like it). Most importantly, the enterprise use is fundamentally *about* performance. It might be argued that enterprise is about getting money, and that damages will do that perfectly well, but that is to look at it from only one person's perspective, namely that of the disappointed innocent party. Society has a need of enterprise, of goods and services being produced, of jobs being created and so forth. The power of contract to enable enterprise depends on contracts being performed. The benefits of enterprise, also, can be seen to go beyond the merely financial and measurable into a wide range of intangible and individual satisfactions, and beyond the individual to wider societal benefits.

In terms of Macneil's list of norms, it is submitted that the norm posited here of satisfying performance expectations comprehends, whether wholly or partially, exclusively or not, the norms of implementation of planning, effectuation of consent, creation and restraint of power, and role integrity.

Implementation of Planning

Contracts (in so far as they contain any noticeable degree of futurity) may be said to be 'about' planning. A producer, for instance, with a contract to supply its product to a customer, can purchase raw materials, devote staff time to production, et cetera, in the knowledge that if the customer refuses to accept and pay for the goods he will be obliged to pay damages. Thus contract effectuates the implementation of planning. Contract is not, of course, the only projector of exchange, as we discussed above[67] — non-promissory exchange projectors are at least as important in many activities — but it is an immensely powerful one and a great favourite with enterprise.

64 See, D Friedmann, above, n 19, and, for a good recent overview, C Webb, above, n 20.
65 See, especially, Webb, above, n 20.
66 H C Havighurst, *The Nature of Private Contract*, Northwestern UP, Chicago, 1961.
67 Above, n 33 and text thereat.

Effectuation of Consent

Contracts are intimately tangled up with the idea of consent, in that they may be said both to be triggered by consent and to be a mode by which the content of consent may be realised. We agree together on some activity; for example, the activity of buying and selling a motor car. The consent of one to sell and the other to buy leads to entering the contract: why else? The same consent is typically effectuated by entering a contract; there are other 'hows', of course, but contract is a popular option; indeed, generally in such a case one would need to take positive steps in order to avoid a contract, in the lawyer's sense,[68] and it is hard to see at all how this is not a contractual-*type* relation, even if one were to take such steps. Consent is clearly linked to planning: the planning defines what it is that parties consent to, and parties plan pre-contractually or post-contractually (or, perhaps it is better to say, intra-contractually) for the effectuation of their mutual consent.

What parties tend to be consenting to, of course, is that something be performed. That is to say, that the stipulations of the contract be performed, rather than payment of damages for failure to perform the stipulations. Thus, the notion of the effectuation consent is tied into the norm of satisfying performance expectations. Taking again the example given above of the householder contracting for work to repair or improve her house, it seems doubtful, at least, that she would consent to enter into a contract with a builder who says frankly at the outset that he does not plan to do the work, but merely to compensate her for the cost of having someone else do it instead, provided she properly mitigates her loss. Our householder wants the work done; that is to say, she only consents to enter into the contract on the understanding that it is intended to cause the stipulated-for primary performance to eventuate. There is no point, so far as she is concerned, entering into the contract merely to become entitled to damages. Would a business do so either? The present author is inclined to doubt this, too. Some contracts are entered into for specifically financial reasons, for instance insurance, or financial derivatives, but these are quite different as the stipulated-for performance was always intended to be the payment of money upon a given contingency. Generally speaking, even businesses contract in order to get things done or delivered, not as a sort of wager, let alone deliberately contracting in vain.[69] The analogy between ordinary contracts and contracts of insurance should not, in short, be taken too far: ordinary commercial contracts are generally entered into to facilitate actual physical enterprise, building cars, for example, not in order to

68 For instance, declaring any agreement to buy and sell the motor car to be 'binding in honour only', see, eg, ***Rose & Frank*** *& Co v J R Crompton & Bros Ltd* [1925] AC 445.

69 It is true that, in terms of doctrinal contract law, a decision has to be made between whether a court should favour one party's expectation of actual performance or the other party's preference for breaching and paying damages. Ultimately the latter has been preferred, see especially ***Suisse Atlantique*** *Societé d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361. But the very fact that such a case as *Suisse Atlantique* reaches the courts, let alone right up to the House of Lords, rather demonstrates the strength of the case for supposing that businesses prefer, and expect, performance, and may place more value on actual performance than on substitutionary awards, a point that has been made time and again in the literature and has led to the coining of the term 'performance interest' (see eg D Friedmann, above, n 19, and C Webb, above, n 20).

provide insurance against not having components, not having workers, not having a dealer network. One benefit of contract over 'gentlemen's agreement'[70] is indeed that one has some sort of security if the contract is breached, but that is not the sole reason for entering into it. The agreement itself, stripped bare of contractual force, is what is sought, contractual force is added to provide a fallback in damages, and also to disincentivise breach by the other party, because he or she has less to gain by breaching a contract than by breaching a 'gentlemen's agreement', since in the case of a contract, along with the damage that will accrue from agreement-breaking generally (such as the likely inability to deal with that party again in the future, gaining a reputation in the trade for unreliability, and so on) there will be damages to pay as well.

Thus, we may say that the expectation of performance of the express stipulations is the essence of that to which the parties have consented. It is through performance, then, that consent is effectuated in contract.

Creation and Restraint of power

One of Macneil's norms is that of the 'creation and restraint of power'.[71] About this he says:[72]

> [T]he very ideas of consent, of contractual planning, of contractual solidarity, and of the linking norms, all presuppose ability to create changes in power relations. When, for example, people sign instalment purchase agreements, they create power in the sellers that they lacked before. Without such shifts of power the other norms would constantly be rendered inoperative.

Various types of power are created by contract, as Macneil goes on to point out:[73]

> Lawyers are most familiar with creation of *legal* power. But power may be economic, social, and political as well; indeed at normal operating levels of contracts, it is those kinds of power, not legal power, that count the most.

Power in contract is also restrained. Macneil finds this exemplified in the 'relatively weak remedies for breach of contract' available in many jurisdictions.[74] This can be seen slightly differently: one person's power created is inevitably another's power restrained. Entering into any contract, we both gain and sacrifice power: we limit our freedom of action within the contract. A weak remedy for breach of contract is not really an example of contract restraining power, since without the contract, there would be less (if any) remedy, thus even less power.

So, what is the content of the power? The power may be in nature legal, economic, social, or political, but what is it a power to *do*? Again, the power is one to enforce performance of a promise or else exact a substitute. The law's remedies are relatively weak here, but they restrict the potential gain of the

70 I mean an agreement intended to be binding, but in honour only — see eg *Rose & Frank & Co v J R Crompton & Bros Ltd*, above, n 68.
71 See *New Social Contract*, above, n 22, pp 56–7.
72 Above, n 22, p 56.
73 Above, n 22.
74 Above, n 22, p 57.

breaching party.[75] The other forms of power, social, economic and political, often provide very strong restraints on the likelihood of refusal to perform. Power (of whatever type) created in contract is both directed at securing stipulated-for performance, and is itself instantiated in that performance.

Role Integrity

Another aspect of the norm of satisfying performance expectations, which we can discuss here quite briefly, is Macneil's norm of role integrity.[76] This idea, for Macneil, comprises three main aspects: consistency, conflict, and complexity. It is submitted that the key aspect is really consistency: consistency over time, and conformity with the role. The former refers to the expectation that people will continue (for so long as is relevant in the particular situation) to play a certain role.[77] The latter is concerned with what the role comprehends:[78]

> In any given society any particular role is typically not a potpourri of whatever any incumbent wishes to assemble. A role is, among other things, a technique of social control. A limited number of roles will be recognised, and each expected to have some internal harmony. [. . .]
>
> Needless to say, the social limitations on roles need not originate in law or in greater society. Most of them emerge from sources much closer to the workings of the contractual relations themselves. These produce consistency over time as well as a kind of internal consistency resulting both from the specialisation and from limited capacities of particular roles.

Let us ask one simple question here: why does consistency matter? It matters because only insofar as the other party to a relation behaves in conformity with the role (for example, a lawyer we retain is appropriately qualified and expert, keeps our secrets, acts only for us, not our opponent, and otherwise keeps to at least such professional ethics as are relevant to us), and continues in the role long enough to perform all the stipulations (for example, a builder does not decide to become a monk halfway through building our kitchen extension) can our performance expectations be satisfied: this is why role integrity is important.

To summarise, the norm of satisfying performance expectations can be taken to comprehend (largely) the functions and contents of Macneil's norms of implementation of planning, effectuation of consent, creation and restraint of power, and role integrity. It can also be characterised as being the basis of

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75 This is presuming one makes the, rather large, assumption that the breaching party really is deliberately breaching in order to make a calculated gain. In the real world of contracts litigation the picture is seldom so clear-cut, generally with much argument as to whether acts were in breach and who, indeed, was in breach at any time. I have spent long hours in smoke-filled rooms negotiating for one party alleged to be in breach, whilst in turn alleging the other party is in breach, whilst myself perfectly convinced that both parties were behaving in all sincerity.

76 *New Social Contract*, above, n 22, pp 40–4.

77 Macneil gives the following example: 'We are all bemused by the cab driver who turns out to be a philosopher, with or without the PhD, but bemusement turns to anger if in the middle of the ride from O'Hare Airport he drops us off at a corner with the announcement that he is taking up philosophy full time. His role as a cabbie simply does not permit such a sudden and complete change' (*New Social Contract*, above, n 22, p 41).

78 *New Social Contract*, above, n 22, pp 41–2.

the 'performance interest' in contracts and offers one theoretical ground for supporting the protection of such an interest in contract remedies.

Substantial Fairness

This norm approximately covers the functions of two of Macneil's norms, namely reciprocity[79] and propriety of means.[80] Of the first of these, Macneil has written that '[t]he norm of mutuality calls not for equality . . . but for some kind of evenness',[81] and that ' . . . simply stated [it is] the principle of getting something back for something given'.[82] Propriety of means Macneil has defined thus: ' . . . the ways relations are carried on as distinct from more substantive matters, including not merely formal and informal procedures, but such things as customary behaviour, often of the most subtle kind'.[83]

This author has discussed these two norms elsewhere and analysed them in terms of being norms of substantive and procedural fairness, respectively,[84] whilst also acknowledging that Macneil has distinguished the reciprocity norm (indeed, his norms generally) from ' . . . such less specific, but more familiar, concepts such as good faith, substantive unconscionability, fairness, etc'.[85] This author stands by the approach of treating these norms as being essentially indistinguishable, at least at a working level, from supposedly broader notions like substantive unconscionability and fairness. We have to work with the vocabulary we have available, the distinctions our language permits, and difficulties arise when we try to differentiate between 'evenness' and 'equality', for instance. The *Shorter Oxford English Dictionary* defines 'evenness' thus: 'The quality or state of being even; smoothness, levelness; uniformity; equibility; equipoise (*lit.* and *fig.*); equitableness; equality'. Evenness, then, can be defined as equality. Equitableness is also in the definition. The *SOED* defines 'equitable' in turn as '[c]haracterised by equity or fairness'. The distinction we have to make is, perhaps, between (as near as possible) perfect fairness and approximate fairness; a notion of something being broadly fair, when all is considered. It is this idea that is here labelled 'substantial fairness'.[86]

Fairness in contract can be considered to embrace both substantive fairness (the 'deal' itself being one which fairly distributes or shares benefits and burdens, not only in its own terms, but, in appropriate cases, also judged in its wider social and economic context), and procedural fairness, being the idea that a contractual relation should be brought about and conducted in a way that is honest (at least does not cross beyond acceptable bounds of

79 So called in I R Macneil, 'Contracting Worlds and Essential Contract Theory', above, n 6, originally labelled 'mutuality'.

80 Above, n 6.

81 *New Social Contract,* above, n 22, p 44.

82 'Contracting Worlds and Essential Contract Theory', above, n 6, p 432.

83 Above, n 6.

84 Above, n 10.

85 Letter of 30 April 1998 from Ian R Macneil to the editors of the Northwestern University Law Review, cited in J Feinman, 'Relational Contract Theory in Context', above, n 3 at 747.

86 Note 'substantial' not 'substantive', which is, however, a consideration in substantial fairness.

advantage-seeking), which, again, may require a contextual approach.[87]

Substantive Fairness

As Hugh Collins has pointed out:[88]

> English contract law lacks a general principle of fairness. The courts have set their backs towards such general principles as inequality of bargaining power, a duty to bargain in good faith and testing the adequacy of consideration. [. . .] Instead, the courts rely on particularistic, discrete doctrines, mostly drawn from equity, which can be utilised to counteract patent instances of unfairness.

One example of such a discrete doctrine is the rule against penalties.[89] A number of statutory rules promote (or impose) elements of substantive fairness, for instance ss 13 and 14 of the Sale of Goods Act 1979, various provisions of the Unfair Contract Terms Act 1977, and elements of the Unfair Terms in Consumer Contracts Regulations 1999. Nonetheless, it seems beyond doubt that a norm of substantive fairness is not one that finds powerful protection in the English law of contracts.

Legal force, however, is only one aspect of the power behind contractual norms. A degree of reciprocity, beyond the merely formal reciprocity of the peppercorn rent, has always been needed in economic exchange (at least if not intended as a gift — but even in gifts there can be a hidden reciprocation), so far as we know. In early societies, reciprocity must have been an essential condition of specialisation: without sufficient, substantially fair reciprocity why would agriculturalists share their produce with the village potter, or the potter supply his wares to the hunters? By and large, without sufficient reciprocity in contracts, contracts would not be made at all. What interest would a party have in entering into a contract if nothing was to be gained from it, or the gains were insufficient (as the saying goes, 'the game is not worth the candle')?

In cases where necessity has forced weaker bargainers into contracts in which their commitment is poorly reciprocated, so that they feel that they are getting too many 'harms' to set against the 'goods', social movements respond to the problem. This was precisely the origins of the cooperative movement in England. Shopkeepers were seen to be dealing unfairly with their poorer customers; quality did not reflect price; sharp practices like adding sand to brown sugar to increase its weight, and thereby cheat the customer, were

87 For example, what we might regard as sufficiently fair dealing between A and B, we might not consider fair between A and C, where C is a 'vulnerable consumer', say. We recoil from the use of cunning business tactics to 'get one over' on particularly vulnerable people, when we might grudgingly admire it between businesses of similar power. Likewise what is reasonably acceptable practice in one business, eliciting no more than a shrug of the shoulders, might in another industry be regarded as unethical and result in other firms being reluctant to deal in future with the 'culprit'.

88 H Collins, 'Fairness in Agreed Remedies' in ed C Willet, *Aspects of Fairness in Contract*, Blackstone Press, London, 1996, p 100.

89 Originating in the desire to abolish penal bonds: see A W B Simpson's *Historical Introduction*, in M P Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 15th ed, OUP, Oxford, 2007. The issue remains a live one raised in the courts today: see eg *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC); 104 Con LR 39; *Ringrow Pty Ltd v BP Australia Ltd* (2005) 224 CLR 656; 222 ALR 306; [2005] HCA 71; *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133.

widespread. The upshot of all this was that first in Rochdale, then elsewhere, retail cooperatives were established, with fair prices, no sharp practices, surpluses distributed amongst members (initially these were the staff; later, customers could join the society). It is arguable that late 19th and early 20th-century retail businesses like Sainsbury's,[90] Morrisons,[91] Waitrose,[92] and Tesco,[93] could not, against this background, afford to cheat the customer, so that the response of the cooperative movement resulted in forcing greater mutuality, or fairer reciprocation, on private business.[94] Quite apart from such a sectoral effect resulting from a social movement, an individual business that provides relatively poor reciprocation can expect to lose out to its competitors.[95]

By contrast, low quality will often be tolerated quite happily, if the price is also low: people do not usually have unreasonable expectations as to reciprocation; rather, they expect *fair* or *reasonable* reciprocity. Fairness is not an absolute standard of provision or payment, but depends, certainly so far as substantive fairness is concerned, on the quality–price relationship.[96]

It should be borne in mind, whilst discussing substantial fairness in its aspect of substantive fairness (or adequate reciprocity), that it is not always, or necessarily, the case that price alone fixes expectations as to what is fair reciprocation. A brand may have a reputation for quality at bargain prices. It interferes with quality at its peril, in spite of its competitive prices. The norm of fairness itself makes at least the weak demand that people are not duped into dealing by no-longer true expectations that will now be disappointed;[97]

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90 Founded in Drury Lane, 1869.

91 Wm Morrison Supermarkets began as a butter and cheese stall on Rawson Market in Bradford in 1899.

92 Waite, Rose & Taylor began trading in 1904 at 263 Acton Hill, London. Taylor left in 1906 and the name 'Waitrose' was adopted upon incorporation in 1908.

93 Jack Cohen began selling groceries on Well Street market in the East End in 1919, and invented the Tesco brand for goods in 1924 (he bought a large consignment of tea from T E Stockwell and the name is derived from those initials — TES — and the 'co' from Cohen), and opened the first Tesco store in 1929 at Burnt Oak, Edgware.

94 It might be objected that from 1893 at least, consumers had the protection of the implied terms as to compliance with description and sample, and merchantable quality, but these were unlikely to have meant much or been of any use to the urban working or lower middle classes of Victorian England — the Sale of Goods Act 1893 was framed with what today we call 'business to business contracting' in mind, and litigation would have been beyond the means of most people anyway.

95 An interesting example is Mercedes Benz. The brand enjoys a fairly devoted following, but it has lost sales due to unreliability resulting from Daimler-Benz's decision that it was 'over-engineering' Mercedes cars, and thus unnecessarily sacrificing profit margins. Perhaps as a result, Mercedes fell from dominance of the premium market in the United States where the extremely similar but much more reliable Lexus became the biggest selling luxury brand from 2000 onwards (source: Forbes, http://www.forbes.com/2006/12/15/best-selling-luxury-forbeslife-cx_dl_1218bestsellingluxurycars.html last accessed 20 April 2008).

96 Ryanair, the 'no frills' airline, seems almost to pride itself on its reputation for poor service. But in this case, poor service, surcharges imposed on disabled customers, and the fact that the services are to airports scores of miles away from anywhere most people might want to go, do not put off too many customers, because such service as they do get is sufficient reciprocation for the extremely low price of the flight tickets (as Ryanair itself frequently points out in response to criticisms of its service in the media).

97 The substantive law would not generally interfere here, so long as price and quality are a reasonable match, but there are areas where the law *does* protect simple expectations based

the norm of satisfying performance expectations makes living up to brand or other expectation (irrespective of the objective fairness of relative reciprocity) a very strong demand on contracting parties.[98]

Procedural Fairness

The idea of procedural fairness, where the law is mainly concerned with the formation of the contract, including issues such as incorporation of terms, seems to be more strongly protected by the courts. The doctrines of deceit, misrepresentation, all kinds of duress,[99] and undue influence are all ways in which English law (whether common law or Equity) approaches the issue of procedural fairness. In a sense all these doctrines deal with various species of fraud. Contracts the execution of which are procured through duress or the use of undue influence represent a fraud on the law: in such a case the courts are being presented with and asked to enforce what is meant to be a voluntary agreement, but is really nothing of the sort. Deceit and other forms of misrepresentation (with, in the case of negligent misrepresentation, less degree of culpability, and in the case of innocent misrepresentation, no apparent culpability) involve a species fraud on the other party, who is induced quite voluntarily to enter into a contract he or she would not have entered into had he or she known the truth.

Some incidences of operative mistake also involve the taint of procedural unfairness, especially cases of 'snapping up' a bargain, as in the case of *Hartog v Colin & Shields*,[100] in which the plaintiff sought opportunistically to hold the defendant to an apparent bargain to sell hare skins at 10d per pound for 100 winter hare skins, 6d per pound for 10,000 half hare skins, and 5d per pound for 10,000 summer hare skins, whereas the plaintiff knew perfectly well that the defendant's intention had been to offer them for sale at those prices per piece (there being approximately three pieces to the pound for full skins). The plaintiff knew this because it would have been obvious from previous correspondence and from the trade custom of pricing per piece, that these were meant to be prices per piece.[101]

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on prior information — that is to say that the law considers it unfair that a party whose expectations have been raised should suffer from a change in circumstances on the other party's side, meaning that he or she will not get the expected performance. Examples of this can be found in the idea of continuing representation (that is, the duty to speak up if a representation you have made in negotiations that is true when you make it later, but before the contract is concluded becomes false): *With v O'Flanagan* [1936] Ch 575 CA; and in the idea of representation by conduct eg in *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] EMLR 27.

98 See the discussion of satisfying performance expectations, above.

99 Now most importantly economic duress: see eg *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] QB 705; *Pao On v Lau Yiu Long* [1980] AC 614; and *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366; [1982] 2 All ER 67.

100 [1939] 3 All ER 566.

101 There are other examples of this type of case. A case in which it was held that there had been no operative mistake, despite an arguable snapping up of a bargain is *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 — a decision cited with approval in *Whittaker v Campbell* [1984] QB 318; *The Anticlizo* [1987] 2 Lloyd's Rep 130; and *OT Africa Line Ltd v Vickers plc* [1996] 1 Lloyd's Rep 700, but described by Atiyah as 'absurd and unjustifiable': Sir P S Atiyah, *Introduction to the Law of Contract*, 5th ed,

Summary

In brief, it can be argued that where there is substantive or procedural unfairness, going beyond the trivial, then relations will either not occur at all, or will not be sustained (including being sustained by repetition — as with a customer's relationship with a supermarket, for example), and in some cases will not be upheld by a court of law if enforcement is sought. Market forces, including in extreme cases the development of new social movements, will prevent persistent behaviour that is sufficiently widely considered to be unfair, whether substantively or procedurally.

This norm comprehends Macneil's norms of reciprocity and propriety of means, and it also includes an element of the norm of creation and restraint of power, which has here been dealt with mainly in the discussion of the norm of satisfying performance expectations, since fairness involves giving some powers to parties to enforce fairness in performance, and restraint on the power of the more advantaged bargainer where there is one.

Conclusions

This article has attempted to adumbrate an alternative set of norms for relational analysis of contract. The author believes he has done so in a strictly 'Macneilist' fashion, in that each norm can be 'mapped' onto certain of Macneil's norms. Admittedly, however, not every one of Macneil's norms has been covered. We have not discussed flexibility because this author considers that, as a behaviour, it is an essential component in all the norms: it can be considered not so much a norm in itself as a necessary means to effectuating the norms themselves. How can one hold a relation together over time and changing circumstances without flexibility? Does not society expect flexibility (for example, in wage negotiations between unions and management) so that this is part of the social matrix to which the contract must conform? Is not flexibility, in some instances anyway, an expectation we have of the performance of a contract? And, finally, do we not consider it *fair* to be flexible when appropriate? Further, flexibility requires no special explanation — 'flexibility' means what it says.

Also unmapped here are 'the linking norms — restitution, reliance, and expectation interests', and the 'discrete norm — enhancing discreteness and presentiation'; the former because this author departs from Macneil in not considering this to be a 'norm',[102] the latter for a distinct but similar reason. Just as interests are interests, rather than norms, so discreteness and presentiation, though behavioural patterns observable in the habits of contracting parties, are in themselves the creatures of the analytical approach from which relational theories differ. Classical and neo-classical contract are said to be grounded on norms (or a paradigm) of discreteness and presentiation; relational contract is grounded in a wider, richer interpretation of contract.

Clarendon Press, Oxford, 1995, p 462. I incline to the view that *Centrovincial* involved a decision on the facts that it is hard for those not present at the trial to impugn, though in the cold hard prose of the law reports seems an improbable finding.

102 See text following n 18, above.

Not only that, but the norms which are proposed in this article are intended to be universal — they are matters we can explore in the case of every instance of contract, every entry in the rule book, every proposal for reform, and so on. Discreteness and presentiation though quite assuredly frequently occurring features of contracting behaviour, are not universal in quite the same way: contracts always involve some element of discreteness (or else how do we know one relation from another, or contract from not-contract?), but neither discreteness nor presentiation are features the absence of which can really be blamed for unsuccessful contract relations, for instance. However, if they could be separated out, and 'presentiation' alone identified as a norm, this author would place this aspect of contractual relations in the norm of satisfying performance expectations, since presentiation *is* a part of the idea of planning — we plan *for* something, and plans are necessarily about the *future*, not about the present (which we are already living and therefore cannot *plan* for), nor, obviously, for the past. Moreover, we expect to get what we plan for, and we *consent* to enter into a contractual relation in order to presentiate, in the sense that we are intending, at least to a limited extent and contingently (but sometimes more firmly and more completely), to bind the future in the present.

This scheme's relation to Macneil's norms[103] may be represented thus:

New Norm	**Macneil's Norms principally comprehended therein**
Preservation of the relation	Contractual solidarity Preservation of the relation Harmonisation of relational conflict [Flexibility]
Harmonisation with the social matrix	Harmonisation with the social matrix Supracontract norms [Flexibility]
Satisfying performance expectations	Implementation of planning [& presentiation] Effectuation of consent [to presentiation] Creation [and restraint] of power Role integrity [Flexibility]
Substantial fairness	Propriety of means [Creation and] restraint of power Reciprocity [Flexibility]

As noted above, although the new norms are grounded very firmly in Macneil's, and some of his terminology is adopted, the fit is by no means an exact one. This article purposed to achieve a goal beyond merely description or a sort of hobbyist reductionism. There is a point to this. Macneil provides us with a very rich, detailed, complex apparatus for analysing and classifying contractual behaviour. This scheme is, it is suggested, no less full, in that it does comprehend Macneil's norms; but it is somewhat less complex at its

103 See n 17, above, and text thereat.

basic level, and thus more convenient. It is hoped that it offers a convenient 'tool-kit' for contractual analysis for academics and those professionally involved in the law and in considering exchange relations, but also that it is more accessible and can usefully be taught to undergraduates, without the necessity of constructing their whole course around it.

Macneil has named his particular version of relational contract theory 'essential contract theory', in order to distinguish it from others of 'countless possible relational theories'.[104] This author, then, feels he should do something of the sort for his own version. Inasmuch as the four-norm model proposed *comprehends* specific Macneil norms, and inasmuch as it is intended to provide a complete tool of analysis in the same way as essential contract theory, the author proposes (albeit not without a blush) to call this version 'comprehensive contract theory'.

104 I R Macneil, 'Reflections on Relational Contract Theory after a Neo-classical Seminar', above, n 13, 207, n 1.